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Trusts and Succession

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TRUSTS AND SUCCESSION

MICHAEL R. KLEIN*

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I. INTRODUCTION

The interval between the last¹ and present *Survey* has been far more active for the Legislature than for the courts. An attempt has herein been made to discuss both statutory and judicial developments primarily from the standpoint of synthesis, as opposed to naked reporting. Comments upon the wisdom of particular developments have been made only where clearly appropriate.

II. LEGISLATION

Of the legislative innovations relating to the area of trusts, easily the most significant of the survey period was the statutory provision authorizing the creation of the land trust.² The section permits the trustee of real property to be empowered to "protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property . . ."³ in the trust. Under the Act, those dealing with the

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1. Thomas, *Trusts and Succession*, 16 U. MIAMI L. REV. 581 (1961). This *Survey* includes all subsequent cases reported through August, 1965.

2. FLA. STAT. § 689.071(1)-(6) (1963).

3. *Id.* at (1).

trustee are under no duty to inquire beyond the face of the recorded trust instrument as to either the extent of the trustee's authority or the interests of the beneficiaries, and they may take the property acquired from the trustee free of any limitations and interests which are not set forth clearly in the recorded trust instrument.⁴ Another subsection of the Act authorizes a provision making the beneficiaries' interest under such trust agreement personalty.⁵ The Act is expressly exclusive, however, of the provisions of section 689.07.⁶

The Legislature was far more active in the area of succession, than in the area of trust legislation. In 1961 the period for bringing claims against an estate, where notice to creditors had been published, was generally shortened by two months throughout. In 1963, the Legislature enacted a period of grace for those claims arising against estates between July 1, 1961 and July 1, 1963.⁷ It also placed upon the objector to any claim an additional burden of serving notice of the objection on the claimant within thirty days of the filing of the claim, upon penalty of forfeiture of the objection for failure to so serve.⁸ The period for filing claims against the statutory "small estate" was similarly shortened from eight to six months, where notice has been filed and published.⁹

The right to appeal orders or decrees of the county judge now lies in the "appropriate district court of appeal" unless a direct appeal to the supreme court is otherwise authorized under Article 5, section 4 of the Florida Constitution. These appeals are governed by the Florida appellate rules, including the right to supersedeas.¹⁰ A state agency may now commence a caveat proceeding.¹¹ When a resident or non-resident (other than a corporate fiduciary) seeks letters upon an estate, he must, in writing, designate, for purposes of service of process, an agent or attorney who resides in the county where the administration is pending, and must record his own address in the county judge's office. Thereafter, service upon the designated agent or attorney shall be binding on the personal representative for any suit arising out of the administration of the estate.¹²

The procedure for granting an extension of time to the widow faced with the alternative of electing dower, was broadened to include extensions justified upon a commensurate extension of time for the filing of

4. *Id.* at (2) & (3).

5. *Id.* at (4).

6. *Id.* at (6).

7. FLA. STAT. § 733.16(3) (1963).

8. FLA. STAT. § 733.18(3) (1963).

9. FLA. STAT. § 735.03 (1963).

10. FLA. STAT. § 732.15 (1963). The provisions of this amended section rendered superfluous the provisions which comprised §§ 732.16-.20, which were, therefore, repealed.

11. FLA. STAT. § 732.29 (1963).

12. FLA. STAT. § 732.15 (1965).

objections to the claims of creditors or suits thereon, and an additional ten days was added onto the previous sixty day period within which the widow must elect after the resolution of any one of these enumerated disputes relating to the estate.¹³ Where the widow dies during the period for her election, her beneficiaries are no longer given the opportunity to seek an election in their own interests.¹⁴

When the sale of estate property is authorized in the will of the decedent, the power to so dispose of the property will only vest in the named executor(s), absent an apparent intention to create an impersonal power to dispose, otherwise evidenced by the decedent.¹⁵ When the estate property included stock or shares in a mutual fund, the courts were previously authorized to approve the holding of the stock or shares in the sole name of the personal representative;¹⁶ where that is done, the personal representative becomes personally liable to the estate for any negligent acts or omissions in regard to the stock.¹⁷ In 1965, this authorization was broadened to include "registered bonds, notes, debentures, or revenue certificates issued by any corporation, government, municipality, or subdivisions or agencies thereof."¹⁸

An altogether new statute was enacted governing testamentary donations or bequests of parts of the decedent's body.¹⁹

Substantial alterations occurred with reference to the distribution of property of a decedent. The Uniform Principal and Income Law²⁰ is now applicable to the principal and income of all estates of decedents entered into probate after July 1, 1965.²¹ Major alterations, too lengthy to develop here fully, affected: the transfer of assets in land to a surviving spouse;²² the apportionment of estate taxes;²³ the order in which the assets of an estate are to be appropriated;²⁴ the liability for payment of mortgages on devised realty;²⁵ the procedure for final settlement of the estate and discharge of the personal representative;²⁶ and the disposition of any unclaimed funds held by a personal representative.²⁷ A new provision was also enacted to govern the distribution of income tax refunds

13. FLA. STAT. § 731.35(2) (1965).

14. FLA. STAT. § 731.35(3) (1965). This was accomplished by re-enacting only the first sentence in subsection (3).

15. FLA. STAT. § 733.22 (1965).

16. With or without disclosing the fiduciary capacity.

17. FLA. STAT. § 733.361 (1963).

18. FLA. STAT. § 733.361 (1965).

19. FLA. STAT. § 736.18 (1963), as amended by a new subsection (7) (1965).

20. FLA. STAT. § 733.011 (1965).

21. FLA. STAT. ch. 690 (1965).

22. FLA. STAT. § 734.031 (1965).

23. FLA. STAT. § 734.041 (1963) as amended 1965.

24. FLA. STAT. § 734.05 (1965).

25. FLA. STAT. § 734.051 (1965).

26. FLA. STAT. § 734.22 (1965).

27. FLA. STAT. § 734.221 (1965).

paid the estate of a decedent which estate falls within the exemptions of the statutory "small estate."²⁸

III. TRUSTS

A. *Express Trusts*

There are two general categories of trusts which are relevant for the purposes of determining the effectiveness of any attempted creation of a trust. The inter vivos trust is far simpler to create than its counterpart, the testamentary trust. Inasmuch as the testamentary trust is a disposition after death, it must, if it is to be properly created and valid, conform in all respects to the requirements of the Statute of Wills.²⁹ In *Valdez v. Muniz*,³⁰ the court was confronted with a fact pattern which called upon it to characterize a purported trust as either inter vivos or testamentary. The decedent had told a debtor, when the debtor offered to pay, that he did not need the money at the time. The decedent said that he would ask for it if he did need it, and that if he died prior to such a request, the debtor should hold the money in trust for the decedent's grandson. This declaration was placed in issue as purportedly creating an inter vivos trust. The court held, however, that it was merely an attempted creation of a testamentary trust which had failed to meet the strict formal requirements of a testamentary disposition.

Presented with a complicated tripartite trust agreement, with interlocking survivors, the court in *First Nat'l Bank v. Kerness*,³¹ was called upon to discuss the prerequisites to dissolution of an irrevocable trust. The court re-enunciated the general proposition that only in exceptional cases will a court order the dissolution of a trust prior to a designated point of expiration. Here the plaintiff had attempted to obtain dissolution on a theory of consent of all the interested parties. In rejecting the attempt, the court accented the failure of the plaintiff to satisfy all requisites of proof by restating the language first employed in *Byers v. Beddow*:³²

There was a larger class where the court would decree dissolution of the trust on the application of all the interested parties, but this was strictly limited to cases where the whole design and object of the trust scheme had been practically accomplished, and all of the interests created by it had become vested, and all of the parties beneficially interested desired its termination.³³

Here, sufficient parties had not so indicated their intention, nor had the trust purpose been practically accomplished.

28. FLA. STAT. § 735.15 (1965).

29. FLA. STAT. § 731.07 (1965).

30. 164 So.2d 876 (Fla. 2d Dist. 1964).

31. 142 So.2d 777 (Fla. 3d Dist. 1962).

32. 106 Fla. 166, 142 So. 894 (1932), cited at 142 So.2d 780.

33. *Id.* at 168, 142 So. at 896.

In *Hexter v. Gautier*,³⁴ the Florida Supreme Court characterized the interest of a beneficiary as vested, subject to divestment, rather than contingent, so as to make the interest amenable to intangible property tax assessment. The interest was one which gave the beneficiary a life estate, with a power to dispose of the corpus by will if: (1) he was over forty years of age at death; and (2) he left no natural lineal descendants, or their issue.

B. Resulting Trusts

The resulting trust is a creature of equity, established on the basis of the implied intent of the parties, drawn from the circumstances. Generally speaking, there are three situations within which a resulting trust may arise. One such circumstance is an ineffective attempt to create a trust where a corpus remains unprovided for.³⁵ Another circumstance giving rise to a resulting trust is the termination of a trust through the fulfillment of its purpose at a time at which part of the corpus remains unprovided for. A final circumstance which may give rise to a resulting trust is the purchase money resulting trust, wherein a trust is presumed from the circumstance of one purchasing property with his own money, but in another's name.

The resulting trust is not, however, a general equity device to be employed loosely in an effort to work fairness. Thus in *Grapes v. Mitchell*,³⁶ the supreme court refused to establish a resulting trust where the parties had failed in an attempt to prove an express trust. The circumstances did not fit into any one of the three limited circumstantial categories which may give rise to a resulting trust. In the *Grapes* case, the circumstances were those of a gift over to a father, with an alleged understanding that the gift was to be held in trust for the children.

Inasmuch as the trust is implied, rather than expressed, the affect of presumptions and burdens of proof play an especially strong part in the determination of the cases. When the facts presented by the record show that all prerequisite circumstances are present to satisfy one of the three instances in which a resulting trust may arise, a presumption arises in favor of the existence of the trust and it can only be rebutted by "strong and convincing evidence." Thus in *Tomayko v. Thomas*,³⁷ the naked allegation that funds deposited in a joint savings account were the subject matter of a gift was inadequate to rebut the presumption of a resulting trust when it was otherwise proper to imply the existence of a resulting trust. Similarly, in *Cook v. Katiba*,³⁸ the court sustained a com-

34. 153 So.2d 713 (Fla. 1963).

35. *Watson v. St. Petersburg Bank & Trust Co.*, 146 So.2d 383 (Fla. 2d Dist. 1962).

36. 159 So.2d 465 (Fla. 1964).

37. 144 So.2d 335 (3d Dist. 1962), *cert. discharged*, 151 So.2d 272 (Fla. 1963).

38. 152 So.2d 504 (Fla. 1st Dist. 1963).

plaint, under attack on a motion to dismiss for its failure to state a cause of action, where the allegations asserted facts sufficient to satisfy the circumstances requisite to the imposition of a purchase money resulting trust in a parcel of land on an estoppel theory. However, in *Jones v. Jones*,³⁹ the court pointed out that there need be a showing "by evidence so strong, clear and unequivocal as to remove from the mind of the Chancellor any reasonable doubt as to the existence of the [purchase money resulting] trust."⁴⁰ Thus, that court reversed the Chancellor's finding that there was such a showing because the proof was only "substantial." Evidently, it was not substantial enough.

It cannot be forgotten, however, that the resulting trust is the tool of equity, and thus it will not be imposed, despite a clear proof of the requisite circumstances, when the interests of innocent third parties would suffer.⁴¹ Conversely, absent those same equities, the resulting trust will be imposed to determine the rights of parties where there has been a good faith attempt to establish a trust which has failed.

C. Constructive Trusts

The constructive trust is a creature of equity imposed in certain circumstances, such as those wherein it can prevent fraud. In *Botsikas v. Yarmack*,⁴² the court chose to extend the application of the constructive trust to prevent unjust enrichment arising out of an alleged abuse of a confidential relationship. Thus, the court reversed a dismissal for the failure of a complaint to set forth a cause of action where it was alleged that the plaintiff had been induced to contribute toward the purchase price of certain property as a result of her confidence in the decedent. Under these circumstances, the decedent's estate would have been unjustly enriched. The court felt that this allegation, if proven, would justify the imposition of the constructive trust over the property in question.

It is clear, however, that the constructive trust will not be employed merely to save an otherwise unsuccessful attempt to impose a resulting trust. Thus in *Dames v. Dames*,⁴³ the court first refused to impose a purchase money resulting trust because the husband-wife relationship created the presumption that property paid for by one is taken in the other's name as a gift. The court went further, and held that absent an adequate showing of fraud, the asserted interest of the other spouse could not be imposed by the device of the constructive trust.

39. 140 So.2d 318 (Fla. 3d Dist. 1962).

40. *Id.* at 320, citing *Goldman v. Olsen*, 159 Fla. 435, 31 So.2d 623 (1947).

41. *Watson v. St. Petersburg Bank & Trust Co.*, *supra* note 35; *Prescott v. Kreher*, 153 So.2d 319 (Fla. 2d Dist. 1963).

42. 172 So.2d 277 (Fla. 3d Dist. 1965).

43. 149 So.2d 570 (Fla. 3d Dist. 1963).

When the property interest which one acquires is limited by statute, he takes it subject, at the very least, to a constructive trust which conforms his interest to the scope set forth in the statute. Thus a co-parcener who re-acquired property after a Murphy Act⁴⁴ violation, for non-payment of taxes, was held in *Albury v. Gordon*⁴⁵ to have acquired the property subject to a constructive trust in favor of the co-parcener. The relevant statute precludes one co-parcener from re-acquiring such property as against another co-parcener. Moreover, the constructive trust, as a creature of equity, is not subject to any restriction in the form of a statute of limitations. Its life may be cut off by laches, but the mere passage of time is ordinarily insufficient to establish a defense of laches. An injury to an intervening equity need be shown.

D. *The Land Trust Act*

In *Grammer v. Roman*,⁴⁶ the court held that the recently enacted Florida Land Trust Act⁴⁷ was a remedial statute such as justifies its broad and liberal construction and therefore afforded it retroactive effect.

E. *Powers and Duties of the Trustee*

In *Baum v. Corn*,⁴⁸ an action was brought by corporation shareholders seeking an accounting by their trustee and the cancellation of a mortgage executed by him. The complaint alleged that the corporation president, who held legal title to certain land as trustee for the corporation, had improperly mortgaged the land. In sustaining the complaint, the court re-enunciated the view that a trustee has no authority to convey or encumber the corpus absent a special grant of such authority in the trust agreement. However, the court did point out that opposite result might occur where the shareholders were shown to have known or to have been under a duty to know of the mortgage, and hence under a duty to protect both the corpus and all parties involved. The mere acquiescence of the shareholders in the trustee's possession of legal title was inadequate, in and of itself, to establish such an estoppel situation. Indeed the court found an affirmative duty, in this case, on the part of the mortgagees to inquire into the authority, *vel non*, of the trustee to incumber part of the trust corpus. In an action for an accounting, a co-trustee, co-beneficiary is a party who can properly bring the suit,⁴⁹ and is under an affirmative obligation to do so where there may have been misappropriation of trust funds.

An example of a finding of an abuse of discretion on the part of a

44. FLA. STAT. § 192.35-.50 (1965).

45. 164 So.2d 549 (Fla. 3d Dist. 1964).

46. 174 So.2d 443 (Fla. 2d Dist. 1965).

47. FLA. STAT. ch. 689 (1965).

48. 167 So.2d 740 (Fla. 2d Dist. 1964).

49. *Payiasis v. Robillard*, 171 So.2d 630 (Fla. 3d Dist. 1965).

trustee of a discretionary testamentary trust was presented in *In re True's Trust*.⁵⁰ For a gross abuse of his discretion or other conduct inconsistent with his continued performance as a trustee, a trustee can be removed, as can a guardian of the interest of a minor beneficiary. But the mere appearance of the beneficiary and his guardian as adverse parties in a proceeding connected with the guardianship, is by itself an inadequate basis for removal of the guardian on the grounds of hostility.⁵¹

IV. SUCCESSION

A. Formal Requisites

1. ATTESTATION AND SIGNING OF A WILL

Section 731.07, subsections (1) and (2), requires that the testator either sign a will personally, or direct another to subscribe his name in his presence. In either event two witnesses must attest to the genuineness of the signature at the time of the signing. When the testator has directed that another should sign his name, the one so directed can also satisfy the requirement of an attesting witness despite the fact that his name appears solely as that of a party directed to sign for the testator.⁵²

The adequacy of the testator's signature arose in a series of "X" cases in the third district. In three instances, the court refused probate to wills on the ground that the testator had not signed his name, but had instead merely placed an "X" where the signature should have been.⁵³ The result was predicated upon an interpretation of the statutory term, "sign,"⁵⁴ which characterized it as requiring a "full signature." As indicated in the dissent of Judge Hendry of the third district, the result is a poor one.⁵⁵ The only justification for such a result would be the prevention of fraud which is far more appropriately assured by the attestations of the witnesses.

When the attesting witness is essential to the satisfaction of the requirement of two subscribing witnesses, any bequest in his behalf is valid only to the extent to which that witness would have taken if the will were not established. The designation of one as a recipient of a mere legal interest as a trustee, by a provision of the will does not bring such person within the category of interested witnesses; a beneficial interest

50. 158 So.2d 571 (Fla. 3d Dist. 1964).

51. *Rosen v. Rosen*, 167 So.2d 70 (Fla. 3d Dist. 1964).

52. *In re Lomineck's Estate*, 155 So.2d 561 (Fla. 1st Dist. 1963).

53. *In re Levitt's Estate*, 172 So.2d 466 (Fla. 3d Dist. 1965); *In re Zarkey's Estate*, 172 So.2d 465 (Fla. 3d Dist. 1965); *In re William's Estate*, 172 So.2d 464 (Fla. 3d Dist. 1965).

54. FLA. STAT. § 731.07(1) (1965).

55. *In re Levitt's Estate*, *supra* note 53, at 466-468. In a caustic reversing opinion, rendered subsequent to the period covered by this *Survey*, the supreme court concluded that an "X" was sufficient. *In re William's Estate*, 182 So.2d 10 (Fla. 1965).

must be involved for these rules to apply.⁵⁶ An interesting discussion of the rules relating to these requirements of disinterested witnesses arose in *In re Lubee's Estate*.⁵⁷ There had been three attesting witnesses to the signing of this will, but two of them, including the residuary legatee, were interested witnesses. From an order declaring that legatee's interest void, the residuary legatee appealed, raising three arguments; all were rejected. His first contention was that there were two disinterested witnesses to this *particular* bequest, as he alone was the residuary legatee. Moreover, he argued that the savings provision of section 731.07(5) applied to the residuary legatee. Pointing out that both arguments avoided the apparent intent of these provisions, the court declared that (1) the witnesses were required to witness the entire will, and (2) the savings clause was only effective to save the interest of those who would have taken at intestacy, not to save the interests of those, as the appellant, who would have taken by a prior will, but not by intestacy. The third argument raised by the appellant was that the doctrine of dependent relative revocation would apply to save his interest. Rejecting this argument under the facts of the case, the court pointed out that the doctrine is merely a presumption of presumed intent, one which was not sustained on the facts of the case before them, which included an express provision in this will revoking a prior will under which the appellant sought to sustain his bequest.

2. NUNCUPATIVE WILL

A nuncupative will, in order to be valid, must have been declared during the "last sickness" of the decedent in the presence of three witnesses whose presence was requested by the decedent.⁵⁸ An issue of when the decedent's last sickness occurs was raised in *In re Vaughn's Estate*.⁵⁹ There the deceased declared his testamentary desires in the presence of three witnesses during his terminal illness just prior to being taken to the hospital. On the way to the hospital, the deceased lapsed into a comatose condition and died six days later without regaining consciousness. The first district court, in affirming that the decedent's nuncupative will conformed to the statutory requirement that it be declared during his "last sickness," adopted the view that there is sufficient compliance with the statute if the sickness has progressed to a point where the testator expects death at any time, is liable to die at any time and in fact, does die from such sickness.⁶⁰

56. *In re Koop's Estate*, 142 So.2d 693 (Fla. 3d Dist. 1962).

57. 142 So.2d 130 (Fla. 2d Dist. 1962).

58. FLA. STAT. § 731.06 (1965).

59. 165 So.2d 241 (Fla. 1st Dist. 1964).

60. There are apparently three views on the issue of when a testator has executed a nuncupative will complying with the statutory requirement that it be declared during his final illness:

1. Some courts require that the declaration be made at a time when the testator is in extremis and would not therefore have had an opportunity to reduce his intentions to writing.

3. COMPETENT PARTIES

A testator must possess a sound mind in order to have the mental capacity necessary to execute a valid will.⁶¹ The term "sound mind" connotes the ability of the testator to understand, in a general way, the nature and extent of the property to be disposed of, his relationship to those who would naturally claim a substantial benefit from the will, and the practical effect of the will as executed.⁶² Mere old age, physical frailty, sickness, failing memory or vacillating judgment are not inconsistent with testamentary capacity if the testamentary prerequisites were possessed by the testator.⁶³ This rule holds especially true where the will is fair and does not provide for an unnatural disposition of the property.⁶⁴

The above principles were applied in *In re Dunson's Estate*⁶⁵ where the court held that the testatrix had the requisite mental capacity to execute a will despite the fact that she died at the age of seventy-nine from brain cancer five months after executing the will, and despite the fact that she was declared mentally incompetent two days before her death.

A question of whether the use of narcotics deprived a testator of the requisite mental capacity to execute a will was raised in *In re Witt's Estate*⁶⁶ where the testatrix took narcotics to ease the pain of terminal cancer under her tongue. The court held that the use of narcotics does not necessarily deprive a testator of testamentary capacity. The court further stated that a testator could possess the requisite testamentary capacity even though it was proven that he was somewhat under the influence of drugs at the time he executed his will.

4. UNDUE INFLUENCE

When a substantial beneficiary under a will is active in its procurement and there exists a confidential relationship between the beneficiary and testator, a presumption arises that the will was the product of undue influence.⁶⁷ However, the mere existence of a confidential relationship between the parties is not sufficient to raise the presumption of undue influence, nor is such a relationship sufficient to cast the burden of proving the absence of undue influence upon the proponent of the will.⁶⁸

2. Other courts hold that the declaration is sufficient, if at the time of its utterance, the testator supposed that his present illness would prove fatal.

3. The Florida court adhered to the view stated in the text which accompanies this note.

See *Annot.* 9 A.L.R. 462 (1920).

61. FLA. STAT. § 731.04 (1965).

62. *In re Dunson's Estate*, 141 So.2d 601 (Fla. 2d Dist. 1962).

63. *Butler v. Williams*, 141 So.2d 4 (Fla. 2d Dist. 1962).

64. *In re Dunson's Estate*, *supra* note 62.

65. *Ibid.*

66. 139 So.2d 904 (Fla. 2d Dist. 1962).

67. *In re Joiner's Estate*, 156 So.2d 161 (Fla. 1963). *Accord*, *In re Schor's Estate*, 172 So.2d 888 (Fla. 3d Dist. 1965).

68. *In re Joiner's Estate*, *supra* note 67.

Before a will can be invalidated upon the ground of undue influence, the influence must be such that it amounts to overpersuasion, duress, force, coercion or artful or fraudulent contrivances to such an extent that there is a destruction of the free agency and willpower of the testator. Mere affection, kindness or attachment of one person for another may not of itself constitute undue influence.⁶⁹ The court will, however, consider all of the facts in the case in order to determine whether undue influence has been exerted. Direct evidence is unnecessary because the existence of undue influence may be established by circumstantial evidence.⁷⁰ The court in *In re Reid's Estate*,⁷¹ for instance, considered such factors as the attorney's social activities with the testatrix, his business associations with her, and testimony of the subscribing witnesses to the will, before it determined that undue influence had been exerted.

The degree of proof necessary to rebut a presumption of undue influence varies in each factual situation but:

A much higher degree of proof is required to overcome an inference of undue influence where the testator is shown to have impaired mental powers or clouded intellect than where the testator is strong mentally and in good health.⁷²

5. CONTRACTS TO MAKE A WILL

In *Hagan v. Laragione*,⁷³ James Mele and his wife, Alice Mele, entered into an oral agreement to execute mutual wills which by its terms provided that the surviving sole beneficiary of the other's will agreed to devise his entire estate to the brothers and sisters of James Mele. The alleged oral agreement was purported to have been made between 1948 and 1951, or in the alternative, on or about September 5, 1958. James died in August 1960. Before Alice died in September 1960, she remarried and executed a new will which devised and bequeathed her entire estate to her second husband. This latter will was admitted to probate and the brothers and sisters of James Mele brought the instant suit for specific performance of the oral agreement. To this suit, the defendant interposed the following defenses: that section 731.051 of the Florida Statutes precluded an action on the oral contract to execute mutual wills; that the portion of the agreement relating to the promise to convey real property, which constituted the largest part of the estate, was violative of sections 689.01 and 725.01 of the Florida Statutes, which require conveyances or contracts to convey realty to be in writing; that the action was barred by the one year provision of section 725.01 of the Florida Statutes; and, that the surviving second spouse was entitled to

69. *In re Dunson's Estate*, 141 So.2d 601 (Fla. 2d Dist. 1962).

70. *In re Reid's Estate*, 138 So.2d 342 (Fla. 3d Dist. 1962).

71. 138 So.2d 342 (Fla. 3d Dist. 1962).

72. *In re Reid's Estate*, 138 So.2d 342, 349 (Fla. 3d Dist. 1962).

73. 170 So.2d 69 (Fla. 2d Dist. 1964).

the estate as a pretermitted spouse under section 731.10 of the Florida Statutes. The trial court entered an order striking all of these defenses, and the defendant prosecuted an interlocutory appeal. The district court, in affirming the trial court's order, held that section 731.051 of the Florida Statutes, which became effective on January 1, 1958 and which provides that all agreements to execute a will in order to be enforceable must be in writing and signed in the presence of two subscribing witnesses, was not applicable to the agreement if it was executed between 1948 and 1951 because the statute as it related to agreements prior to January 1, 1958 had been declared unconstitutional as an impairment of contract rights.⁷⁴ The court held that the statute was not applicable even if the agreement had been entered into on September 5, 1958 because the agreement was partially performed, and partial performance removed the contract from the operation of the statute. The court went on to hold that the doctrine of partial performance excluded the contract from the sanctions of sections 689.01 and 725.01 of the Florida Statutes. In holding that the one year provision of 725.01 was not applicable to the contract, the court reasoned that if a contract is susceptible of being performed within one year, and no time is agreed upon for performance, then it is not within the Statute of Frauds because either party might have died within the one year. The court concluded by holding that although a surviving wife would have been entitled to a dower interest, there is no corresponding right of curtesy in Florida for the benefit of the husband.

Where the oral agreement to perform services for the remainder of the decedent's life in exchange for a promise to make a will is entered into outside the State of Florida, the Florida forum will look to the place of its execution in order to determine the contract's validity. This result obtained in *Buenger v. Kennedy*⁷⁵ which also involved an issue of the applicability of section 95.11(7)(b) of the Florida Statutes to suits in quantum meruit. The court held that suits in quantum meruit for the recovery of wages for services rendered are governed by section 95.11(7)(b), which bars an action for wages earned more than one year prior to the commencement of the suit.

B. *Interests Arising out of the Marital Tie*

A number of cases during the surveyed period additionally defined the nature of the survivorship interests arising out of the marital tie. Upon the death of the husband, a widow, in Florida, can accede to an interest in the estate of her late husband in one of three ways. She can take either under a will, or under the laws of descent and distribution⁷⁶

74. *Keith v. Culp*, 111 So.2d 278 (Fla. 1st Dist. 1959).

75. 151 So.2d 463 (Fla. 2d Dist. 1963).

76. FLA. STAT. § 731.23(1) (1965):

The real and personal property of an intestate shall descend and be distributed as follows:

where there is no valid will, or elect⁷⁷ to take a dower interest⁷⁸ if she is unsatisfied with the share she would have taken under the will or by intestacy, whichever the case may be. The surviving husband, of course, can take under the will or by operation of the laws of descent and distribution,⁷⁹ although he cannot elect curtesy, since that interest is no longer recognized in Florida.

In order for the surviving spouse to take any of these interests, it must be established that there was a marital relationship in existence at the time of the death of the other spouse. In several cases during the surveyed period, the courts dealt with fact patterns which presented the issue of a sufficient marital relationship.

The equitable doctrine of estoppel was thrice interposed to bar a claimant who was a legal spouse of the decedent. The basis for the estoppel was clear in each instance. In *Mason v. Mason*,⁸⁰ the wife had abandoned divorce proceedings without the knowledge of her husband, had stood by silently while he entered into another "marriage" with a second woman, and then attempted to assert an intestate interest in property which the husband and his second "wife" had taken "in the entireties." The estoppel asserted, however, was collateral rather than direct, in that the rationale employed by the court was that the wife succeeded to the interest of her husband, who was himself estopped from denying the validity of the subsequent marriage. In *In re Moye's Estate*,⁸¹ estoppel was utilized to bar a widow who had deserted her husband, and then herself entered into a bigamous second marriage. Finally, in *Nedd v. Starry*,⁸² a husband, who had deserted his wife and subsequently had entered into two bigamous marriages, was estopped from asserting an interest in the estate of his wife. The analysis of the Chancellor below was restated approvingly by the first district as representing the correct Florida position.⁸³

[While] adultery, or even a subsequent bigamous marriage does not ipso facto estop a surviving spouse from asserting a right in or arising out of the estate of the deceased spouse or from claiming death benefits arising out of the relationship of husband and wife, . . . misconduct of a flagrant and inexcusable character evincing an abandonment and repudiation of the marriage

(1) To the surviving spouse and lineal descendants, the surviving spouse taking the same as if he or she were one of the children. . . .

77. FLA. STAT. § 731.35 (1965).

78. FLA. STAT. § 731.34 (1965).

79. FLA. STAT. § 731.23(1) (1965).

80. 174 So.2d 620 (Fla. 3d Dist. 1963).

81. 160 So.2d 620 (Fla. 2d Dist. 1963).

82. 143 So.2d 522 (Fla. 2d Dist. 1962).

83. Both courts reviewed the previous decisions in the area: *Doherty v. Traxler*, 66 So.2d 274 (Fla. 1953); *Quinn v. Miles*, 124 So.2d 883 (Fla. 1st Dist. 1960); *Kreisel v. Ingham*, 113 So.2d 205 (Fla. 2d Dist. 1959); *Perkins v. Richards Constr., Inc.*, 111 So.2d 494 (Fla. 2d Dist. 1959).

obligations will operate to estop one from enjoying such rights or may constitute a basis for application of the doctrine of unclean hands.⁸⁴

Section 733.20(d)(i) of Florida Statutes makes provision for intermediate family allowance to sustain a family in the period between the loss of the breadwinner and such time as final settlement or award can be determined and effecuated.⁸⁵ In determining whether or not to afford such relief the courts have been less than prospective in setting standards whereby a case may be pre-evaluated;⁸⁶ however, it is clear that general equity principles do apply. Moreover, the relief has been likened to the temporary alimony award, and cases in that area might prove helpful.⁸⁷

An interesting factual situation, involving both the family allowance provisions and dower was presented in *Levine v. Feuer*.⁸⁸ In a non-jury proceeding to determine an alleged widow's right to a family allowance, the trial judge ruled that the woman was not the widow of the decedent. When the same woman subsequently sought to elect dower, the executor successfully moved to strike the purported election on the ground that the issue of the woman's relation to the decedent had already been determined adversely to her by the county judge. On appeal, the third district reversed the order below, pointing out the express provision for determination *by jury* of all factual issues relating to dower,⁸⁹ and rejecting the contention that the petition for family allowance, which had placed the issue of the marital relationship before the county judge, could act as a bar or waiver of that right of determination by jury.

When the testator's will was made prior to his marriage to the surviving spouse, the survivor is pretermitted and deemed entitled to an intestate share.⁹⁰ The requisites of this statutory provision are: (1) a valid will executed prior to the marriage; (2) the subsequent marriage; (3) the death of the testator; and (4) the surviving spouse. Once these requisites are shown, there are a number of practical considerations involved in the determination of the exceptions to this rule. These were first considered in Florida in *In re Livingston's Estate*.⁹¹ Here the court imposed an additional burden on one seeking the benefit of the statute, a requirement that the claimant demonstrate the absence of a provision in the will on his behalf. The rule announced is contrary to a shifting

84. 143 So.2d, at 524.

85. This discretionary relief was refused in *In re Anderson's Estate*, 149 So.2d 65 (Fla. 2d Dist. 1963), and therein described with relation to the equities, or lack of equities, involved.

86. See the dictum in *In re Anderson's Estate*, *id.* at 68.

87. *Id.* at 67.

88. 152 So.2d 784 (Fla. 3d Dist. 1963).

89. FLA. STAT. § 733.12(3) (1965).

90. FLA. STAT. § 731.10 (1965).

91. 172 So.2d 619 (Fla. 2d Dist. 1965).

burden of proof employed under similar statutes in New York⁹² and California.⁹³

If a will is made while there is a marriage, and the parties subsequently divorce, any provision for the surviving former spouse ceases to be effective at the point of the divorce,⁹⁴ and a subsequent remarriage between the same two parties will not revive the provision, but will render the survivor pretermitted.⁹⁵ An interesting factual variation on this theme was presented by *Conascenta v. Giordano*.⁹⁶ Here the parties were living together at the time the will was executed, subsequently remarried and were later divorced. It later appeared, however, that the decedent had already been married prior to the whole relationship with the claimant, and had never been divorced therefrom. In denying effect to a provision for the claimant under decedent's will, the court chose, as its basis, the putative divorce, despite the void nature of the putative marital status. In so doing the court rejected what it considered an unreasonable, although literal interpretation of the statute in deference to the overriding legislative intent.

Where a widow decides to elect dower, she will not be barred by a prior acceptance of benefits under the will, so long as she revokes the benefits and her acceptance has not induced action by third parties as would justify estoppel.⁹⁷ Where the widow does so elect, she cannot take a provision in the will on her behalf, even if the provision was made prior to marriage and in satisfaction of a debt.⁹⁸

In 1959, the Legislature amended section 731.35, altering, under certain circumstances, the time within which the widow must make her election of dower.⁹⁹ In two cases, the first and second districts reached different results regarding the retroactive affect of this amendment. In *Martz v. Riskamm*,¹⁰⁰ the first district refused to preclude a widow's election where it would have been barred by operation of the provisions in effect at the death of the decedent, on the grounds that the Legislature could extend the period for election inasmuch as the widow had not yet lost her right at the time of the amendment. But in *In re Roger's Estate*,¹⁰¹ the second district refused to revive a right of election which had expired prior to the amendment, despite circumstances which would have rendered her election timely under the new provisions.

92. *In re Snopek's Estate*, 249 App. Div. 396, 292 N.Y. Supp. 359 (1937); *In re Van Hoecke's Will*, 197 Misc. 339, 93 N.Y.S.2d 19 (Surrog. Ct. 1949).

93. *In re Corker's Estate*, 87 Cal. 643, 25 Pac. 922 (1891).

94. FLA. STAT. § 731.101 (1965).

95. *Bauer v. Reese*, 161 So.2d 678 (Fla. 1st Dist. 1964).

96. 143 So.2d 682 (Fla. 3d Dist. 1962).

97. *In re Coffey's Estate*, 171 So.2d 568 (Fla. 3d Dist. 1965).

98. *In re Saperstein's Estate*, 158 So.2d 538 (Fla. 3d Dist. 1963).

99. See discussion in text accompanying note 13, *supra*.

100. 144 So.2d 83 (Fla. 1st Dist. 1962).

101. 171 So.2d 428 (Fla. 2d Dist. 1965).

C. Adopted Children

Adoption and the rights coincidental to it are regulated by statute in Florida.¹⁰² Included among the rights of adoption is the statutory right of an unmarried adult to adopt another adult.¹⁰³ However, an adopted adult is not entitled, under the pretermitted heir statute,¹⁰⁴ to inherit from the adopting unmarried adult. This latter conclusion was reached in *Tsilidis v. Pedakis*¹⁰⁵ where the first district court denied the adopted adult's claim under the pretermitted heir statute on the theory that Chapter 72 of the Florida Statutes is in derogation of the common law and must therefore be strictly construed. It should be noted, however, that in 1963 the legislature amended section 72.34 of the Florida Statutes, which provided for adoption of adults, so that now, a court faced with the factual situation in *Tsilidis* would reach a conclusion opposite to that arrived at by the first district.

An adopted child may not inherit from collateral adoptive relatives.¹⁰⁶ But the adopted child may inherit from his natural collateral blood kindred.¹⁰⁷

In a case of first impression,¹⁰⁸ the second district court of appeal has held that a child adopted after the execution of the will is a pretermitted heir within the statutory meaning of section 731.11 of the Florida Statutes. The court considered that the legislature intended pretermitted child statutes to apply to the situation where a child¹⁰⁹ is adopted after the execution of a will, especially since the legislature had clothed adopted children with all of the rights and benefits of a natural child.

Is an adopted child a lineal descendant within the meaning of the Florida anti-lapse statute?¹¹⁰ A very recent second district court case has announced an affirmative answer to this question.¹¹¹ In concluding that the adopted daughter was entitled to her father's share under his deceased aunt's will, the court, in this first impression case, stated that the anti-lapse statute does not require that the person ultimately taking be a lineal descendant of the testator but only that he be a lineal descendant of the legatee or devisee named in the will.

102. FLA. STAT. §§ 72.07-72.40 (1965).

103. FLA. STAT. § 72.34 (1965).

104. FLA. STAT. § 731.11 (1965).

105. 132 So.2d 9 (Fla. 1st Dist. 1961).

106. FLA. STAT. § 731.30 (1965).

107. *In re Levy's Estate*, 141 So.2d 803 (Fla. 2d Dist. 1962).

108. *In re Frizzell's Estate*, 156 So.2d 558 (Fla. 2d Dist. 1963).

109. It should be noted that in the case of an adopted adult the rule may be different. See *Tsilidis v. Pedakis*, 132 So.2d 9 (Fla. 1st Dist. 1961) and text accompanying note 105.

110. FLA. STAT. § 731.20 (1965).

111. *In re Baker's Estate*, 172 So.2d 268 (Fla. 2d Dist. 1965) noted in 20 U. MIAMI L. REV. 461 (1965).

D. *Advancements*

An advancement consists of property given to a next of kin in his lifetime, and its value is fixed as of the time of the advancement.¹¹²

E. *Insurance Proceeds*

When there is no specific bequest in the will, regarding proceeds from insurance policies which are payable to the decedent's estate, and the decedent leaves no surviving spouse or child, should the proceeds be distributed to the sole beneficiary under the will or should the proceeds be distributed according to the intestate laws of descent and distribution? This question was answered in *Thomas v. Nuckols*¹¹³ where the first district reversed a holding by the trial court that the proceeds should be distributed under the laws of intestate succession. The district court applied section 222.13, which provides for the disposition of proceeds from life insurance policies. Since the decedent left neither a surviving child nor a surviving spouse, the court determined that the insurance proceeds should be paid to the personal representative and that they should constitute a part of the assets of the estate to be distributed in accordance with the directions in the will.

The first district court in *In re Alworth's Estate*¹¹⁴ held that section 222.13 was also intended by the legislature to be a statute of descent and distribution. Thus, the court held that where the decedent leaves a surviving wife and child, and the proceeds of the life insurance policies are payable to the executor of the decedent's estate and have not been specifically bequeathed in the will, the statute dictates that the surviving wife and child are entitled to the proceeds.

The decedent in *Rogers v. Rogers*¹¹⁵ designated his first wife as beneficiary of his accumulated contributions to the Florida Teacher's Retirement Fund. Subsequent to this designation, he was divorced from his first wife and married his present wife. The trial court held that the second wife was entitled to the fund on the theory that the right to designate the beneficiary was intended by the legislature to be in the nature of a testamentary disposition. Therefore, the designation of the beneficiary was revoked by operation of section 731.101 of the Florida Statutes, which provides that a divorce renders a will null and void insofar as it affects the surviving divorced spouse. The first district court reversed the trial court's decision and held that the benefits accruing to the designated beneficiary under the Retirement Fund provisions of section 238.07 of the Florida Statutes are in the nature of proceeds from

112. *Livingston v. Crickenberger*, 141 So.2d 794 (Fla. 1st Dist. 1962) resting its decision upon FLA. STAT. § 734.07 (1961).

113. 157 So.2d 712 (Fla. 1st Dist. 1963).

114. 151 So.2d 478 (Fla. 1st Dist. 1963).

115. 152 So.2d 183 (Fla. 1st Dist. 1963).

an annuity or life insurance policy and in the absence of an express provision to the contrary in the agreement, the benefits are not affected by the mere fact that the parties are divorced subsequent to the making of the contract.

F. Will Construction

The intent of the testator remains, once again, the "polestar" for the courts in cases involving the construction of wills. However, as the courts work their way through the particularized facts of each will contest, very often doctrine and presumption help to point the way.

The doctrine of ejusdem generis was utilized in *In re Horne's Estate*.¹¹⁶ The bequest in question had provided that the sister should get a ring and "any other personal property that I own that I have not otherwise disposed of in the will."¹¹⁷ This provision, read in light of a general residuary clause which followed, was construed, under the doctrine of ejusdem generis, to speak only of things in the general class of rings, that class being tangible personalty. The court pointed out, however, that the doctrine does not apply: (1) where the general words appear in a general bequest of the estate, or (2) where the words appear in the residuary clause, or (3) where, because of the absence of a residuary clause, the goods not included in the scope of the bequest would otherwise pass by intestacy (the law favoring testacy over intestacy).

When there is conflict over whether a particular bequest is properly characterized as "specific" or "general," with the commensurate affect on the order within which they might be defeated, the presumption aiding the court in its determination is that the bequest is general, rather than specific.¹¹⁸ The burden of proving otherwise rests upon the party asserting the "specific" characterization.

In another case the term "to pay" was pivotal in the court's determination that the bequest, in favor of two non-profit charitable corporations, was a gift absolute rather than a gift in trust.¹¹⁹ When the testator's bequest is that of a percentage interest in the estate, the better rule of construction is that the percentage will be of the net distributable estate.¹²⁰ Where a will contained a bequest in favor of "Mr. & Mrs." the parties each take, with all others within the same bequest, as individual beneficiaries, rather than as a single unit in the entireties.¹²¹

In a rather complicated factual pattern, the court in *In re Rentz's Estate*¹²² pointed out two aspects of the doctrine of the destruction of

116. 171 So.2d 14 (Fla. 2d Dist. 1965).

117. *Id.* at 15.

118. *In re Garrison's Estate*, 156 So.2d 18 (Fla. 1st Dist. 1963).

119. *In re Thourez' Estate*, 166 So.2d 476 (Fla. 2d Dist. 1964).

120. *Aronson v. Congregation Temple de Hirsch*, 138 So.2d 69 (Fla. 3d Dist. 1962).

121. *Dixon v. Davis*, 155 So.2d 189 (Fla. 2d Dist. 1963).

122. 152 So.2d 480 (Fla. 3d Dist. 1963).

contingent remainders. The doctrine does not apply to *personalty*, but only to interest of a *real* nature. Moreover, for the doctrine to have the affect of destroying the remainderman interest through merger, the interests would have to be placed in the hands of a third party since the destruction cannot take place by the same instrument, at the same time, by the same person.

Yet with all of the presumptions, the strength of the search for a way to fulfill the testator's intent remains as the paramount motivation. An excellent example of this was afforded in *In re Roulston's Estate*¹²³ where, because of peculiar circumstances of the case which established such testamentary intent, the words "to her use and pleasure *as long as she shall live*" was construed to create an interest in fee.

G. Will Contests

In *State v. Byington*,¹²⁴ the county judge upon his own motion, made after the expiration of the six month period within which objections to probate had to be filed, entered an Order of Investigation and to Account which was directed to the executor and prohibited him from dispersing any estate funds pending the outcome of the investigation. The following day the county judge, once again upon his own motion, and without notice or hearing, ordered that the executor show cause why the probate of the will should not be revoked because of his presumptive exercise of undue influence, and moreover, why he should not be held in contempt of court and removed from his post of executor for mismanagement and for the unauthorized dispersal of estate funds. The executor sought a writ of prohibition directed against the county judge. In support of the petition, the executor alleged that the county judge exceeded his jurisdiction by entering the above orders pursuant to his own motions and that the probate of the will had otherwise become final under the provisions of section 732.28(6) of the Florida Statutes. The executor further alleged that the county judge was disqualified to act because of his non-compliance with the automatic retirement provision of the Florida Constitution,¹²⁵ which requires justices and judges to retire at age 70. The first district, in denying the petition, held that the county judge was clearly acting within the scope of his authority when he entered the complained-of orders. Among the inherent powers of any court is the power to vacate its own orders, judgments and decrees to prevent abuse, oppression, injustice, to protect its own jurisdiction, and to correct mistakes and supply defects in its own decrees. The court further held that section 732.28(6) of the Florida Statutes does not limit the period within which the probate court may, for good cause shown, exercise its discretionary

123. 142 So.2d 107 (Fla. 2d Dist. 1962) (emphasis added).

124. 168 So.2d 164 (Fla. 1st Dist. 1964).

125. FLA. CONST. art. V, § 17(1).

power to vacate a decree admitting a will to probate. The court interpreted the statute as being intended to limit the time within which *parties interested in the estate* could challenge the validity of a will that had been offered for probate. As to the allegation that the judge was beyond retirement age, the court concluded that he was at least a de facto judge, and that in any event a quo warranto proceeding, and not a writ of prohibition, would have been the proper method of attack.

The petitioners in *In re Estes' Estate*¹²⁶ sought to employ the discovery procedures¹²⁷ provided for in the Florida Rules of Civil Procedure in aid of their will contest. The county judge entered an order denying discovery. On certiorari, the county judge's order was quashed. The third district reasoned that the Florida Rules of Civil Procedure were applicable to a will contest in the county judge's court inasmuch as a will contest is civil in nature.

One of the beneficiaries in *In re Deane's Estate*¹²⁸ sought to have the probate of a will revoked on the basis that the attorney-executor had spoiled the will by the substitution of a different second page. At a hearing, the beneficiary introduced parol evidence of the testator's declarations in support of his contention that the spoiled paragraphs ran counter to the testator's long-expressed purposes. The county judge revoked probate of the spoiled will, reconstructed the provisions spoiled thereby re-establishing the will, and removed the attorney as the executor. On appeal, the county judge's action was affirmed and a contention that the contestant failed in his burden of proof was rejected. The appellate court noted that as a general rule in proceedings contesting the validity of a purported will, the proponent has the burden of proving, prima facie, the formal execution and attestation of the will, and then, the contestant must assume the burden of establishing the grounds upon which he opposes probate by a preponderance of the evidence. The court held, however, that there is an exception to the normal order of proof where it is shown that the provisions of the purported will run counter to the natural affection of the testator or counter to his long-expressed purposes. The court stated that in such a case the proponent has the burden of dispelling inherent improbabilities and of proving, by a preponderance of the evidence, that the purported will is in fact the testator's freely and voluntarily executed will. In concluding that the proponent attorney-executor failed to sustain his burden of proof, the court adopted the majority view that where the existence and due execution of a lost or spoiled will have been proved, and the presumption of revocation rebutted, parol evidence of the declarations of the testator is admissible to establish the contents of the lost or spoiled portions.

126. 158 So.2d 794 (Fla. 3d Dist. 1963).

127. The petitioner sought requests for admissions, answers to interrogatories, depositions, and the production of documents.

128. 153 So.2d 26 (Fla. 3d Dist. 1963).

The first district reversed an order admitting an attested holographic will and codicil to probate for the reason that the county judge predicated his order upon a supposed presumption of testacy. The district court held that prior to the will's admission to probate there is no presumption as to its validity.¹²⁹

The plaintiff in *Schenkel v. Atlantic Nat'l Bank*¹³⁰ sued the executors of the decedent's estate to recover upon an alleged oral agreement between herself and the decedent to the effect that the decedent had promised to bequeath to the plaintiff the equivalent of \$200 per month during the period that the plaintiff rendered personal services to the decedent. The plaintiff sought to recover \$26,400 for services which were rendered over a period of eleven years. The jury returned an \$18,000 verdict for the plaintiff, but the trial court granted the executors a new trial on the grounds, *inter alia*, that it had erred in striking two of the executor's defenses to the complaint; *viz.*, that the suit was not commenced within the three year period provided by section 95.11(5) of the Florida Statutes, and that the alleged contract was not intended by the parties to be performed within a year and was not in writing as required by the Statute of Frauds. On appeal, the district court held that the two defenses were properly struck. The court held that where the promise sued upon is an oral promise to bequeath money, the statute of limitations does not begin to run until the testatrix' death. In regard to the alleged defense of the Statute of Frauds, the appellate court reasoned that the one year provision of section 725.01 of the Florida Statutes was not applicable because the defendant-executor's decedent might have died within a year, therefore the contract could have been performed prior to the expiration of that period of time.

H. Jurisdictional Problems

The jurisdiction of a county judge's court is limited to that expressly provided by statute or constitution. Those courts have jurisdiction over strictly probate matters, with the commensurate powers to enforce its determinations. But the mere fact that an estate is a party to an action will not vest the county judge with jurisdiction over the action. Thus, there is no jurisdiction in the county judge to determine title in property merely because one of the claimants is an estate.¹³¹ Moreover, in an action demanding an accounting by a guardian for alleged activities which conflicted with the duties of the guardian *vis-a-vis* his ward, the county judge was held to have exceeded his jurisdiction where the legal effect of his order was to create a resulting trust in favor of the ward.¹³²

129. *In re Nuchol's Estate*, 147 So.2d 340 (Fla. 1st Dist. 1962).

130. 141 So.2d 327 (Fla. 1st Dist. 1962).

131. *In re O'Neal's Estate*, 142 So.2d 315 (Fla. 2d Dist. 1962).

132. *In re Guardianship of White*, 140 So.2d 311 (Fla. 1st Dist. 1962).

The jurisdiction over trust estates and suits to establish trusts belongs exclusively to courts of equity.

One rather interesting decision considered the general rules which determine the proper jurisdiction in which a will should be probated. In *Biederman v. Cheatham*,¹³³ the decedent's will had been admitted to probate in a Florida county judge's court upon a finding that the decedent had died a domiciliary of Florida. On appeal to the second district, one issue was whether the location of the testator's property or his domicile was determinative of jurisdiction for probate. The court aligned Florida with the current majority position, that the law of the decedent's domicile at death controls the probate procedure. This rule was announced notwithstanding a prior determination by another state that the testator had died domiciled in that forum. The court refused to give that determination any effect other than that of binding the parties to that prior determination, by way of collateral estoppel, on the issue of domicile.

In *Miller v. Miller*,¹³⁴ the wife of a decedent sought a declaratory decree to determine her rights under an antenuptial agreement, which she alleged to be void. The chancellor denied the executor's motion to dismiss. The executor then took an interlocutory appeal contesting the jurisdiction of the chancellor to entertain such a plea as well as the sufficiency of the complaint itself. On appeal, the second district held that the chancellor did have jurisdiction to entertain such a plea, but that there were insufficient facts to establish a justiciable controversy in that the wife had not set forth any injury under the agreement. The chancellor's discretion does not extend to the proffering of legal advice prior to the present existence of a justiciable controversy, but in view of the strict requirement that dower be timely elected, a more liberal application of declaratory relief would appear in order.

I. *Timeliness of Claims against the Estate*

Section 733.16 of the Florida Statutes, 1965, provides that claims against the estate of a decedent must be timely brought or they will be barred.¹³⁵ The period for filing such claims is now six months from the publication of the first notice to creditors, as a result of a 1961 amendment. So as to equitably preserve claims arising during interim period, the 1963 Legislature added subsection (3) to 733.16, which established a period of grace for those claims filed within eight months from publication to creditors, between July 1, 1961 and July 1, 1963.

133. 161 So.2d 538 (Fla. 2d Dist. 1964).

134. 151 So.2d 869 (Fla. 2d Dist. 1963).

135. E.g., *Simpson v. Simpson*, 143 So.2d 707 (Fla. 1st Dist. 1962). The issue arose on an appeal from an order by the county judge requiring the inclusion of certain outstanding obligations of the decedent, incurred during his lifetime, but not claimed within the statutory period.

While none of these legislative amendments were directly at issue, the surveyed period was an active one for judicial determinations relating to the issue of timeliness. In *In re Moore's Estate*,¹³⁶ the court refused to follow a federal rule¹³⁷ exempting, from no-claim statutes, claims asserted by the United States in its sovereign capacity. In the *Moore* case, the court barred a claim, for lack of timeliness, which had been filed by the State of Florida. The tolling of the period for filing commences with the date of the first publication of the notice, not the filing of proof of publication with the county judge, although the filed proof is *prima facie* evidence of the facts stated therein.¹³⁸

The tolling provisions can, of course, be avoided where the claim asserted is that of certain equitable interests in the estate. In such instances, the interest comes within the certain enumerated exceptions to the six month period set forth in section 733.19.¹³⁹ In *Buck v. McNab*,¹⁴⁰ the court reached this result by the employment of the doctrine of equitable conversion, despite the fact that the claimant was precluded in his attempt to obtain an order of specific performance of a contract to sell realty between himself and the decedent. However, the court refused to reach that result in *Staley v. Jackson*,¹⁴¹ wherein an allegation of conversion was considered to be inadequate in that it failed to establish any right of the claimant in *specific property* as required by section 733.19. Without an interest of that identifiable nature, the claimant was relegated to the position of a general creditor, notwithstanding the equitable nature of his claim.

J. *Personal Liability of the Beneficiary*

The plaintiff and defendant in *Kittel v. Simmonite*¹⁴² were entitled to share equally in an estate. The defendant was the administrator of the estate and was also the plaintiff's legal advisor. The defendant advised the plaintiff concerning the distribution of the estate and obtained the plaintiff's consent to it. Nine months after the entry of the orders of distribution and of discharge, the plaintiff brought suit against the defendant individually. The plaintiff alleged that the distribution was not equal and was more favorable to the defendant. He therefore sought compensatory and punitive damages for the loss sustained. The trial court dismissed the amended complaint on the ground that such an action could not be maintained as long as the probate orders remained in effect. On appeal, the third district reversed the order of dismissal since the

136. 145 So.2d 293 (Fla. 1st Dist. 1962).

137. *United States v. Summerlin*, 310 U.S. 414 (1940).

138. *McKinney v. Sill*, 153 So.2d 354 (Fla. 1st Dist. 1963).

139. [T]he provisions of this section shall not be construed to prevent the enforcement of mortgages, pledges, liens or claims to specific property, real or personal.

140. 139 So.2d 734 (Fla. 2d Dist. 1962).

141. 154 So.2d 349 (Fla. 2d Dist. 1963).

142. 152 So.2d 817 (Fla. 3d Dist. 1963).

action was against the defendant in his capacity as an individual, and not in his capacity as an administrator; therefore, it could be maintained even though the probate orders remained in effect because the action did not challenge the orders of the probate court.